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No. 87-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD and PAMELA SCHMIDT,

Petitioners,

v.

OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

1. Are criminal defendants precluded from attacking the constitutionality of a regulatory statute when they are prosecuted for failure to obtain government approval under said statute?

2. Is Ohio law void for vagueness, thereby violating the Due Process Clause, by granting local school superintendents the right to permit or deny a request to home school a child if in his unfettered and undefined discretion the parent is "qualified" to teach?

3. Does Ohio law violate the Due Process Clause by yielding a decision concerning the exercise of fundamental rights to a person with a financial stake in the outcome of the decision?

4. Is a criminal prosecution for the exercise of one's religious beliefs sufficient to demonstrate a "burden" under this Court's Free Exercise tests?

PARTIES

Petitioners are Richard Schmidt (OH. S. CT. No. 86-263) and Pamela Schmidt (OH. S. CT. No. 86-263). Respondent is the State of Ohio.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. WHEN A STATE STATUTE PROVIDES FOR A BALANCING OF INDIVIDUAL RIGHTS AND STATE INTEREST, TO BE MADE ON A CASE BY CASE BASIS UPON APPLICATION OF THE INDIVIDUAL, THE INDIVIDUAL, HAVING FAILED OR REFUSED TO MAKE APPLICATION AND THUS PREVENTED A BALANCING OF INTERESTS TO OCCUR, CAN BE PRECLUDED FROM CHALLENGING THE CONSTITUTIONALITY OF THAT PORTION OF SUCH STATUTE.	1
II. OHIO REVISED CODE SECTION 3321.04 (A)(2) IS NOT UNCONSTITUTIONALLY VAGUE.	6
III. THE ISSUE OF DELEGATION OF DECISION MAKING AUTHORITY TO AN OFFICIAL WITH A FINANCIAL STAKE IN THE OUTCOME WAS NOT RAISED, CONSIDERED, OR RULED UPON IN THE SUPREME COURT OF OHIO OR THE OHIO COURT OF APPEALS, AND, THEREFORE, IS NOT PROPERLY PRESENTED TO THIS COURT FOR CONSIDERATION.	8
IV. OHIO REVISED CODE SECTION 3321.04 (A)(2) DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION.	8
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3,4,5,6,11,13,14,18

State v. Whisner, 47 Ohio St. 2d 181 (1976) 3,4,5,7,12,14,15,16,17,18

Fresh v. Searcy, Case No. 1172, Court of Appeals, Ashtabula County (dated April 5, 1985) 6

Tacon v. Arizona, 410 U.S. 351 (1973) 8

Lawn v. United States, 355 U.S. 339 (1958) 8

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 8

Cardinale v. Louisiana, 394 U.S. 437 (1969) 8

Parr v. State, 117 Ohio St. 23 (1927) 8,11

Direct Plumbing Supply Co. v. Dayton, 138 Ohio St. 540 (1941) 9

Palmer v. Tingle, 55 Ohio St. 423 (1896) 9

Brown v. Board of Educ., 347 U.S. 483, 493 (1954) 9

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 9,10

Meyer v. Nebraska, 262 U.S. 390 (1923) 10

Farrington v. Tokushige, 273 U.S. 284 (1927) 10

Board of Education v. Allen, 392 U.S. 235, 245 (1968) 10

State, Ex rel., Nagle v. Olin, 64 Ohio St. 341, 354 (1980) 13,16,17,18

State v. OJA, Case #82-11-684-SLV (January 7, 1983) (C.P. Delaware City., -Juv. Court) 19,20

STATUTES:

Ohio Rev. Code Section 3321.03 1

Ohio Rev. Code Section 3321.04 ..... *passim*

Ohio Rev. Code Section 3321.04 (A)(2) ..... *passim*

WHEN A STATE STATUTE PROVIDES FOR A BALANCING OF INDIVIDUAL RIGHTS AND STATE INTEREST, TO BE MADE ON A CASE BY CASE BASIS UPON APPLICATION OF THE INDIVIDUAL, THE INDIVIDUAL, HAVING FAILED OR REFUSED TO MAKE APPLICATION AND THUS PREVENTED A BALANCING OF INTERESTS TO OCCUR, CAN BE PRECLUDED FROM CHALLENGING THE CONSTITUTIONALITY OF THAT PORTION OF SUCH STATUTE.

Ohio law requires that all children between the ages of six and eighteen years of age must attend school. Ohio Revised Code Section 3321.03 mandates that:

> Except as herein provided in this section, the parent of a child of compulsory school age shall cause such child to attend a school in the school district in which the child is entitled to attend school under division (B) of Section 3313.64 or Section 3313.65 of the Revised Code, to participate in a special education program under Chapter 3323 of the Ohio Revised Code, *or to otherwise cause him to be instructed in accordance with law.* (Emphasis added)

The duty to attend school may be excused in very limited cases. Exceptions from the compulsory attendance requirements of ORC Section 3321.03, including home instruction, are outlined in Ohio Revised Code Section 3321.04, which reads in pertinent part as follows:

> Excuses from future attendance at our past absence from school or a special education program may be granted for the causes, by the authorities, and under the following conditions:

(A) *The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:*

(2) *That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require.* In each case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend school or a special education program or the qualifications of the person instructing the child at home were determined. *All such excuses shall become void and not subject to recall upon the removal of the disability of the child or the cessation of proper home instruction; and thereupon the child or his parents may be proceeded against after due notice whether such excuse be recalled or not . . .* (Emphasis added)

As discussed in detail herein in Arguments of Law numbers II and IV, dealing specifically with those issues, Ohio Revised Code Sections 3321.04 (A)(2) is neither void for vagueness nor violative of the First Amendment right to free exercise of religion.

A full review was afforded Petitioners by the Supreme Court of Ohio in connection with their challenge for vagueness. With respect to that issue, the Supreme Court of Ohio stated:

> Finally, the requirement, under R.C. 3321.04 (A)(2), that the approval of the local superintendent must be obtained before removing a child from school to a home education program is not vague. Appellants knew that the law required them to request Superintendent Stiller's approval in order to educate Sara at home.

The Supreme Court of Ohio further stated, with respect to the vagueness issue, that:

> The statute gives the superintendent an intelligible principle for his guidance and the desirable flexibility to accommodate home education programs that parents such as appellants and those similarly situated may wish to pursue. An arbitrary and capricious refusal by the superintendent can be measured and corrected in the appeal procedure provided by O.R.C. 3331.08.

As indicated, Ohio, unlike a majority of states, permits "home instruction" under certain circumstances including religious reasons. A parent is *not* mandated by Ohio's Compulsory Education Laws to choose between only two options—sending a child to a public or to a private school which complied with Ohio's minimum standards. A parent has a third option, to instruct their child at home in accordance with their religious beliefs. However, the parent must request and receive approval from the school district *before* withdrawing their child for home study.

When confronted with a religiously based request for exemption, a superintendent must apply the three-pronged test enunciated in *Wisconsin vs Yoder,* 406 U.S. 205 (1972) and adopted by the Ohio Supreme Court in *State vs Whisner,* 47 Ohio St. 2d 181 (1976):

(1) are the religious beliefs sincere?

(2) will application of the compulsory school attendance law infringe on the constitutional right to free exercise of religion?

(3) does the state have an interest of sufficient magnitude to override the claim of violation of the right to free exercise of religion?

If the parent can meet the first two prongs of the test, *and* if the state fails to meet the third, the exemption must be granted.

The State of Ohio, in O.R.C. Section 3321.04 (A)(2), has established a means for balancing the First Amendment free exercise rights of the individual with the compelling interest of the State to impose reasonable regulations for the control and duration of basic education by providing for case by case consideration with respect to home study, to be made upon application by the individual.

In reviewing the Petitioners challenge that O.R.C. 3321.04 (A)(2) violates the First Amendment right to free exercise, the Ohio Supreme Court properly followed the balancing test mandated by this Court in *Yoder,* supra, and adopted by *Whisner,* supra. The review by the Ohio Supreme Court of the aforesaid balancing test and its application to the facts of this case is found at the Appendix to the Petition herein, at 5a-9a.

The Ohio Supreme Court properly held that:

> This court will not speculate as to what result the superintendent would have reached had appellants submitted a proposal. We will not pre-

> sume that the superintendents' actions would have been unconstitutional. . .
>
> The case *sub judice* does not fall within the reach of *Wisconsin* vs. *Yoder,* (1972), 406 U.S. 205, wherein the United States Supreme Court enunciated a standard consistent with our holdings in *Whisner* and *Olin,* supra. Here, as distinguished from *Yoder,* appellants have made a unilateral decision to ignore the plain requirement that an application for their home education proposal be submitted.
>
> Without an application by appellants and without a proposal to the superintendent, there is no way to balance appellants' right to the free exercise of their religion in respect to Sara's education against the state's interest, albeit by least restrictive means, in her education. We therefore do not reach the third prong of the test in *Whisner.*
>
> We hold that the requirement under R.C. 3321.04 (A)(2), that parents must seek the approval of the local superintendent for their home education program in order to obtain an excuse from the compulsory attendance laws, reasonably furthers the state's interest in the education of its citizens and does not infringe upon the free exercise of religion.

O.R.C. Section 3321.04 (A)(2) is, on its face, constitutionally valid. Pursuant to the mandates of this Court and the Ohio Supreme Court, it provides for a balancing of individual and state interests, to be initiated by means of an application by the parents,

and provides intelligible standards to be employed in connection therewith.

Although the means were available to the Petitioners to have their religious beliefs afforded consideration in connection with the matter of home education for their daughter, they chose not to make application, a requirement of which they were aware. Due to the Petitioners' refusal to make application no balancing test could be made and there could be no showing by Petitioners, as required by *Yoder,* supra, that there was an infringement of their right to the free exercise of religion. Under such circumstances, the Ohio Supreme Court properly determined not to speculate as to what action would have been taken had application by the Petitioners been made.

II. OHIO REVISED CODE SECTION 3321.04 (A)(2) IS NOT UNCONSTITUTIONALLY VAGUE.

ORC 3321.04 (A)(2) is not unconstitutionally vague. A recent unreported Court of Appeals case, *Fresh v Searcy,* Case No. 1172, Court of Appeals, Ashtabula County (dated April 5, 1985), held that ORC 3321.04 (A)(2) explicitly states the circumstances under which home instruction is permitted and compulsory attendance is excused and is therefore not unsconstitutionally vague. As the Court in *Fresh* pointed out, religious oriented requests, as well as secular, are within the contemplation of ORC 3321.04 (A)(2). Once the Superintendent where the child resides finds the curriculum is educationally adequate and the instructor is competent to teach those subjects, home instruction must be permitted.

The legislature has promulgated a statute that is general enough to afford parents the ability to meet

the requirements but which also upholds the state's interest in compulsory education.

Respondent respectfully submits that ORC 3321.04 (A)(2) comports with all constitutional requirements because it explicitly allows home instruction, enumerates under what circumstances this exception applies and specifies the right of redress if dissatisfied.

Ohio has clear and unequivocable rules governing home study programs. The Ohio Supreme Court in *State vs. Whisner,* 47 Ohio St. 2d 181 (1976) has set forth explicit rules and regulations governing home study programs. Also, the Ohio State Board of Education has promulgated minimum standards which specifically outline the course of study, hours per day in attendance, and qualification of teachers. Lastly, Ohio provides for judicial review of a Superintendent's decision whether or not to grant a home study exception and his method of supervising that program. Thus, Ohio has already provided a mechanism to prevent a public school superintendent from acting in an arbitrary and capricious manner.

The Petitioners in this case never applied for a home study exemption with Superintendent Stiller. In fact, Mrs. Schmidt stated she had been instructed by attorneys and Mr. Moody not to apply for an exemption or to even make Superintendent Stiller aware that Sara was not attending school! The Schmidts could have resolved this matter within the ambits of the law by working within the law. If dissatisfied with Superintendent Stiller's decisions regarding home study, the Schmidts had the ability to appeal his decision to the juvenile court. See Ohio Revised Code

Section 3321.04 (A)(2). The Petitioners, though well aare of the applicable law, chose to ignore it.

III. THE ISSUE OF DELEGATION OF DECISION MAKING AUTHORITY TO AN OFFICIAL WITH A FINANCIAL STAKE IN THE OUTCOME WAS NOT RAISED, CONSIDERED, OR RULED UPON IN THE SUPREME COURT OF OHIO OR THE OHIO COURT OF APPEALS, AND, THEREFORE, IS NOT PROPERLY PRESENTED TO THIS COURT FOR CONSIDERATION.

It is the general rule, that, in the absence of extraordinary circumstances, the United States Supreme Court will not consider an issue raised for the first time in the Supreme Court. *Tacon v. Arizona,* 410 U.S. 351 (1973), *Lawn v. United States,* 355 U.S. 339 (1958), *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940), *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

As the issue stated above was not raised, considered or ruled upon in the Supreme Court of Ohio or in the Ohio Court of Appeals, it is not properly raised for consideration by the United States Supreme Court.

IV. OHIO REVISED CODE SECTION 3321.04 (A)(2) DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION.

The Petitioners are attacking the compulsory school attendance laws of this state by declaring they do not have to comply with Ohio Revised Code Section 3321.04. The State of Ohio in *Parr vs. State,* 117 Ohio St. 23 (1927) upheld the constitutionality of compulsory education statutes. Numerous decisions of the Supreme Court of the United States have clearly sounded the death knell to the petitioners' assertion that the State is devoid of all powers to promulgate

and enforce reasonable regulations affecting the education of its citizens.

Each state has the power to enact legislation to regulate the conduct of its citizens for the common good. Accordingly, every power will necessarily either interfere or limit a person's constitutional rights, all constitutional protections are subject to the police powers and may be regulated as long as the goal bears a real and substantial relation with the welfare, safety or health of the state's citizenry. See *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540 and *Palmer v. Tingle*, 55 Ohio St. 423.

It is elementary that freedom of religion has a dual aspect, (1) freedom to believe, and (2) freedom to act in exercise of such beliefs. The Constitution of the United States and Ohio recognized that the right to religious beliefs are fundamental and absolute. The exercise of those beliefs, however, is not an absolute right but may and has been regulated by the State's Police powers for the general welfare of society. If it were otherwise, every professed religious doctrine or religious belief would be superior to the law and every citizen would become a law unto himself. Thus government would cease to exist.

Compulsory education is the very foundation of good citizenship and as such, it is the keystone to our democratic society. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

The United States Supreme Court, as early as 1925 upheld, without question, the right of State to require a child to be education and to regulate the educational process. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court stated:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils, to require that all children of proper age attend some school . . . *Id.* at 532

Since *Pierce*, the United States Supreme Court has repeatedly recognized [t]he power of the State to Compel "attendance at some school and to make reasonable regulations for all schools." *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927). These three Supreme Court Decisions set the due process framework for the constitutional limits of parental choice in the education of their children and the state's rights to make fundamental educational decisions.

In fact, the United States Supreme Court has consistently held that the state has the power to promulgate and enforce reasonable regulations affecting the education of its citizens even if religious beliefs are involved. In *Board of Education vs. Allen*, 392 U.S. 235, 245 (1968) the Court stated:

> "A substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction . . . [and that] if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those

> schools perform their secular educational function."
>
> More recently, *Wisconsin v. Yoder*, 406 U.S. 205, 213, 236, held:
>
> "There is no doubts as to the power of a state, having a high responsibility for education if its citizens, to impose reasonable regulations for the control and duration of basic education. Nothing we hold is intended to undermine the general applicability of the state's compulsory school-attendance statutes."

No Supreme Court case or Ohio Supreme Court case has disputed that the State has a fundamental interest in enforcing compulsory education. In fact, *Parr v. State*, 117 Ohio St. 23, 157 NE. (1927) and its progeny stated that a balancing test must be used to weigh the competing interests of the State and parental control of education. *Parr* weighed the balance in favor of the State.

> Compulsory education laws have very generally been upheld by the courts. Statutes making the education of children compulsory have become general in the United States, and their *constitutionality is beyond dispute for the natural rights of a parent to the custody and control of his infant child are subordinate to the powers of the state* and may be restricted and regulated by laws. . . .
>
> Additional authorities might be cited in support of this proposition, but we regard the constitutionality of such laws as so well established that other citation is unnecessary.

> *Id.* at 26, 157 N.E. at 556 (emphasis added) See also *State vs. Whisner*, 47 Ohio St. 2d 181, (1976)

The scales are tipped in favor of the state's police power to regulate education. The parents bear the burden of proving that the statute deprives them of their constitutional rights.

Mr. & Mrs. Schmidt merely assert they are immune from the requirement to apply for home study under ORC 3321.04. This mere assertion is not enought to establish the state's constitutional invalidity. The Schmidts' contend that the mere application for home study is contrary to their religious beliefs. This is contrary to the well established principle that the state does in fact have a compelling state interest to insure a minimum education.

Petitioners contend their religion prevents them from having to be regulated by the state, no matter how slight, regarding the education of their daughter. Petitioners' contentions have been repeatedly struck down in the past by decisions of the Ohio Supreme Court. the Court in *State vs. Whisner*, 47 Ohio St. 2d 181 (1976), recognized that the state has a legitimate interest in ensuring its citizens are educated. Whisner stated:

> "Numerous decision of the Supreme Court of the United States over the years have clearly sounded the death knell with respect to any such assertion . . . that the state is devoid of all power to promulgate and enforce reasonable regulations affecting the operation of non-public schools." *Id.* at 197.

Whisner also stated:

> "The State's interest in education quality is an important one, to be characterized as "compelling" so as to overbalance, legitimate claims to the free exercise of religion, the state must demonstrate that a regulatory implementation of that interest is such that the state's interest cannot otherwise be served."

A more recent Ohio Supreme Court case corroborated the court's traditional stance regarding the educational interests of the State. In *State, Ex rel., Nagle vs. Olin*, 65 Ohio St. 341, 354 (1980) the court held:

> We note . . . that in *State vs. Whisner we emphasized the prima facie reasonableness of the Ohio Compulsory Education enabling legislation particularly Ohio Revised Code Section 3301.07 which mandates that non-public schools provide a general education of a high quality. Thus, it would appear that standards may properly be devised which are designed to assure achievement by students in a wide range of subject areas.* (Emphasis added)

The *Olin* Court also explained why the state has a legitimate interest to assure citizens receive a quality education. The Court held:

> Both this Court and the United States Supreme Court have recognized the importance to the state of assuring that children receive quality educations, enabling them to intelligently undertake the obligations of citizenship. Id. at 510.

The religious belief of the Schmidts are not comparable to that of the Amish parents in *Yoder*. Where

the Amish community had maintained a long-standing religious code of beliefs, the Schmidts espouse a personal belief, one not shared by their church or pastor. In fact, Mr. and Mrs. Schmidt admitted upon cross-examination that their beliefs are not supported by their church or pastor and that their church and pastor do not support the premises that self-instruction is the only religiously acceptable means of education. In fact, the majority of the children of their church attend public or private schools.

The Supreme Court made clear in *Yoder* that personal or philosophical objections to state regulations do not qualify for first amendment protections. The Court emphatically stated: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." 406 U.S. at 215. Therefore, the Schmidt's beliefs are not fundamental rights which by the very assertion, can entirely replace state compulsory education.

Petitioners' religious beliefs may be sincerely held. However, Petitioners have ignored the balancing test outlined in *Yoder, supra,* at 219 and adopted by *Whisner, supra,* at 200. When confronted with a religiously-based request for exemption from compulsory school attendance under Revised Code section 3321.04, the local superintendent of schools must apply the three-pronged test enumerated in *Wisconsin vs. Yoder, supra,* and adopted by Ohio Supreme Court in *State vs. Whisner, supra,* namely: (1) are the religous belief sincere? (2) will application of the compulsory school attendance law infringe on the constitutional right to free exercise of religion? (3) does the state have an interest of sufficient magnitude

to override the claim of violation of the right to free exercise of religion? *If the parent can meet the first two prongs of the test, and if the state fails to meet the third, the exemption must be granted,* (Emphasis added)

As Whisner emphasized:

> [The fact that appellant's religious beliefs are truly held does not end, but rather serves only to begin our inquiry.] 47 Ohio St. 2d at 200

The Schmidt's have not conclusively proven that the state, in applying its law, infringes upon their constitutional rights. Until the Schmidts have met this burden, the state has no burden of proof.

Petitioners cannot demonstrate infringement upon constitutional rights as a result of Ohio Revised Code Section 3321.04 (A)(2) because they never applied for a home study program as outlined by this statute. As stated by the Ohio Supreme Court in *Whisner, supra:*

> [It is incumbent upon (defendants) to demonstrate the manner in which the state . . . infringed upon their free exercise of religious liberty. *Id* at 200.

Upon cross-examination, both Petitioners admitted they *could not* state how the Columbiana Exempted Village School System's home study program would infringe on the beliefs they outlined in their testimony. Although Superintendent Stiller, on numerous occasions offered to meet with the Schmidts to review the matter. Superintendent Stiller offered the Schmidts the opportunity to visit a public school—but they refused. Petitioners also refused to provide Su-

perintendent Stiller with Sara's course program for his review. The Schmidt's, by their uncooperation with Superintendant Stiller, have no idea whether his review would be intrusive. Neither Petitioner tried to work within the law to amicably resolve their differences with the State concerning education. Therefore, the Petitioners did not demonstrate infringement upon constitutional rights as result of any action by the Columbiana Exempted Village School System or personnel as result of application of any "minimum standards", school policy or refusal by the school to approve home based education because *no* request therefore was made by the Petitioners to the public superintendent as permitted by Section 3321.04.

Petitioners cannot successfully claim that *Whisner* and *Olin* support their position that Ohio Revised Code Section 3321.04 (A)(2) infringes upon their constitutional rights of freedom of religion. First, the Ohio Supreme Court in *Whisner, supra,* and Nagle vs. Olin, 64 Ohio St. 2d 341 (1980), made it clear that the State may regulate education and that when the then existing minimum State Board Standards were redesigned, any conflict between religious freedom and the state's interest in compulsory education would be eliminated.

> We held in *State vs. Whisner* that the minimum standards then in effect "overstep the boundary of *reasonable* regulation as applied to a non-public religious school." *Id.*, at 204. Despite our holding, the State Board of Education has not adopted new standards for application to non-public schools which, while adequate to assure the provision of "a general education of a high quality," R.C.

> 3301.07(D), do not simultaneously suffocate "in dependent thought and educational policy," *State vs. Whisner, supra,* at page 215, or abrogate parents liberty to direct the education of their children, *Id.* at page 218
>
> We believe that such a set of less-restrictive standards could be adopted . . . We note . . . that in *State vs. Whisner* we emphasized the *prima facie* reasonableness of the Ohio compulsory education enabling legislation, particulary Revised Code Section 3301.07 which mandates that non-public schools provide a *general* education of a *high* quality. Thus, it would appear that standards may properly be devised which are designed to assure achievement by students in a wide range of subject areas.
>
> Our decision today, as in *State vs. Whisner,* demonstrates simply that *until such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interests in the education of children in private elementary schools,* the balance is weighted, *ab initio,* in favor of a First Amendment claim to religious freedom.

Olin, supra, 64 Ohio St. 2d at 353-355 (emphasis added).

Significantly, the State Board Standards found to have infringed parental rights in *Whisner* and *Olin* have since been replaced with less restrictive regulations as envisioned by the Ohio Supreme Court. Thus, the problems with State Board Standards de-

scribed in *Whisner* and *Olin* cases have been remedied, and State Board Standards can no longer be cited as the basis for any infringement on constitutionality protected right in this area.

According to *Whisner* and *Olin, supra,* once the minimum standards have been changed, the State's interest in compulsory education is "compelling" and the balance between individual religious rights and state rights is weighted, *ab initio,* in favor of the state. In fact, the Ohio Supreme Court confirmed the state's interest to insist that children attend school, to attend for a minimum of hours of instruction, to be taught by teachers of specified training and to be taught certain subjects. *Whisner, supra* at 197.

Petitioners contend the State of Ohio has not established a compelling state interest. The State has established a compelling interest as outlined by the Supreme Court. In *Yoder*, the Supreme Court mandated that a state has a compelling interest in providing access to education for all in order to prepare future citizens to "participate effectively and intelligently in our political system and (2) to be self-reliant and self-sufficient participants in society. 406 U.S. at 221. Without any means of control over education, the State would have no means by which to insure children are in fact receiving an education.

The Ohio Compulsory Education Statute accommodates first amendment free exercise rights in that ORC Section 3321.04 does not preclude a home study exception based on religious beliefs but merely sets forth the circumstances under which a child may be excused from attendance at public or private schools that meet state minimum requirements. In short, Section 3321.04 balances the public's need to assure good

education with the uncontrolled withdrawal of students for home instruction which could be claimed by anyone, anytime, for any reason.

If the Court follows the Petitioners' premises, the State would lose all control over education and the compulsory education law would be a joke. The State would not be able to ascertain whether or not a child was receiving any education, let alone whether the education was adequate. The court is well aware that not every parent, regardless of sincerity, is capable of teaching their children academic courses. The State of Ohio has given differences to religious beliefs of parents by providing a third alternative from sending a child to a public or private school—a "home study" program. The State of Ohio has provided a least restrictive alternative which affords parents religious freedoms without abrogating all state control. Ohio Revised Code Section 3321.04 (A)(2) provides for a case by case consideration on individual applications for home study based upon religious reasons. No other control of home instruction can afford more deference to an individual's religious beliefs than a decision made on an individual basis of consideration by a superintendent that by law has a duty to enforce Ohio's Compulsory Education Laws—the superintendent of the school district where the child resides. Religious freedom is a key consideration in determining whether to grant a home study exemption. See *State vs. OJA*, Case #82-684-SLV (January 7, 1983) (C.P. Delaware City.,-Juv. Court).

It must not be overlooked that the compulsory attendance laws of Ohio serve a public policy of the highest possible order: namely, that all children receive an education which enables them to serve pro-

ductively as members of society and to fulfill their own personal potential. As the Ohio Supreme Court declared in *State vs. Gans*, 168 Ohio St. 174, 181 (1958):

> These sections of the Code exemplify another public policy of this state, which that is our free civilization in this country and in this state will maintain itself and advance only as its members become educated so as to be able to add their knowledge to that of their forefathers and thus progress.

This vital public policy simply cannot be served if parents, at their whim, are permitted to withdraw their children from the public schools. Exceptions to compulsory education must be narrowly construed and subject to the reasonable control of public school officials as prescribed by Revised Code Section 3321.04; otherwise the concept of compulsory education will have little actual meaning. This was recognized by the Delaware County Juvenile Court in *State v. OJA*, supra:

> Home instruction is permitted only upon approval by the school district upon request according to procedures of Section 3321.04. This provides for the balance of public need to assure good education versus uncontrolled withdrawal of students for home instruction which could be claimed by anyone, anytime, for any reason, with poorer education of youths resulting by home education as fiction, rather than fact, Section 3321.04 provides for case by case consideration on individual applications. No other control of

home instruction is possible but on an individual basis of consideration.

Clearly, the State of Ohio can ill-afford the kind of unregulated mail-order education for which Petitioners now seek this court's stamp of approval.The cost is simply too high—not only in societal terms, but also for those children who are victimized because the state has not used all reasonable efforts to insure that every child is afforded an education. The state would have no mechanism for assuring that children in a home with their parents are provided access to any education whatsoever. In fact, a parent could claim to be providing education, but later recant when parental demands may hinder or prevent the children from being instructed.

With home instruction unregulated by the state, the children alone are the consumers, virtually helpless to protect their interests to acquire an adequate education.

Granted the petitioners may be adequately educating Sara. But how can the state ensure that every child has an education, not one just at the whim of a parent? The court certainly has not the time or resources to investigate in order to ferret out those children in a home study program and to continually monitor the parents to ensure the child is in fact receiving an adequate education. Without state supervision, a parent could claim to be providing minimum curriculum, using certain texts and keeping a regular teaching schedule, but parental demands or lack of teaching expertise may prevent the child from obtaining a quality education. If the state does not oversee home instruction, our children are virtually

helpless to protect their interests in an adequate education.

No other control of home instruction is possible but on an individual basis by a public school administrator who must answer by law to the state and whose decision is appealable to the court system if unjustly denied.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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